90-409

No. ——

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BOSTON RANCH COMPANY,
EDWIN R. O'NEILL,
WEST HAVEN FARMING CO.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Petitioners, who own and farm land within the Westlands Water District in California's Central Valley, are beneficiaries of a 1963 water service contract between the district and the Department of the Interior, and are parties to separate recordable contracts with Interior entered into between 1969 and 1974 pursuant to the service contract. Under these contracts Interior sells water to petitioners to irrigate their land. The only rate of payment in the contracts is the $8.00 per acre foot rate in the service contract. The recordable contracts require petitioners to sell their lands in excess of 160 acres within ten years of execution, or later if such period has been extended. As petitioners were legally precluded from selling their excess lands for a number of years, their holding periods were extended to various dates between 1990 and 1992.

In 1986 Interior and petitioners stipulated to entry of a federal court judgment which, among other things, decreed that Interior should perform the 1963 contract. Until December 1987, Interior supplied water to all lands, including excess lands operated under extended recordable contracts, at the same rate.

On December 22, 1987 Congress passed Section 5302(a) of the Omnibus Budget Reconciliation Act of 1987, which added Section 224(h) to the Reclamation Reform Act. Section 224(h) required landowners operating excess lands under extended contracts thereafter to pay approximately $42.00 per acre foot for water.

Petitioners then instituted proceedings to enforce the 1986 judgment, arguing that Section 224(h), if applicable to them, impaired their contracts and abrogated the judgment, and thus violated the due process and takings clauses of the Fifth Amendment and the separation of powers provisions of the United States Constitution.

The Ninth Circuit held, in a split decision, that neither the contracts nor the judgment explicitly provided that owners of excess lands operated under extended contracts were entitled to $8.00 water. Given its view that the price provisions were unclear, the majority initially held that any ambiguity was to be resolved in favor of the government. In an amendment to the opinion, accompanying the denial of petitioners' petition for rehearing, the court also held that the government's obligations should be construed to avoid foreclosing the exercise of sovereign authority. Since, on this basis, petitioners were held to have no rights, their constitutional claims were not sustained. Alternatively, the majority concluded that petitioners' Fifth Amendment claims were reviewable under the rational basis test, and that it doubted that the separation of powers doctrine bars Congress from increasing even an explicit price term in a judgment.

The questions presented here are these:

1. Where Congress legislates the price term in a pre-existing federal commercial contract, which has been enforced by a federal court judgment, and the legislation is challenged under the Constitution, shall inexplicit price terms in the contract and the court judgment be interpreted in accordance with the ordinary canons of interpretation, taking account of the intent of the parties and their course of performance, or solely in accordance with a special canon of construction, which favors the government and takes no account of such factors?

2. Does the due process or takings clause of the Fifth Amendment of the Constitution, or the separation of powers doctrine thereunder, prohibit Congress from enacting the revenue-raising provisions of Section 224(h), as applied to petitioners?

RULE 29.1 LIST

Petitioner Boston Ranch Company is a wholly owned subsidiary of J. G. Boswell Company. Petitioner West Haven Farming Co. has no parent company nor any non-wholly owned subsidiary.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Boston Ranch Company ("Boston Ranch"), Edwin R. O'Neill ("O'Neill"), and West Haven Farming Co. ("West Haven") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINIONS BELOW

The Opinion and the Dissent, reproduced as Appendix A, are reported *sub nom. Barcellos and Wolfsen, Inc., et al. v. Westlands Water District, et al.*, at 899 F.2d 814. The Order amending the Opinion, denying the petition for rehearing, and rejecting the suggestion for rehearing *en banc* is reproduced as Appendix B. The rulings of the United States District Court for the Eastern District of California, reproduced as Appendix C, were not reported.

JURISDICTION

The majority Opinion was filed and judgment entered on March 16, 1990. The above Order was filed on June 7, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article I, Section 1, Article III, Sections 1 and 2, and the Fifth Amendment due process and takings clauses of the United States Constitution are reproduced as Appendix D. Section 203(b) (first sentence), Section 209(e), and Section 205(c) of the Reclamation Reform Act of 1982, 43 U.S.C. §§ 390cc(b), 390ii(e), 390ee(c), are reproduced as Appendix G. Former Rule 11(i)(4) of respondent Department of the Interior ("Interior"), former 43 CFR § 426.11(i)(4) (1983), is reproduced as Appendix H. Section 5302 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101

Stat. 1330-268, which added Section 224(h) to the Reclamation Reform Act, 43 U.S.C. § 390ww(h), is reproduced as Appendix I. Interior's current Rule 11(i)(4)(ii), 43 CFR § 426.11(i)(4)(ii), is reproduced as Appendix J.

STATEMENT OF THE CASE

A. Service And Recordable Contracts

The main purpose of the federal reclamation program is to reclaim the arid regions of the 17 western states and turn them into rich farmland.[1] Interior builds dams, reservoirs, canals, drains, and distribution and drainage systems. Farmers, through water districts, contract with Interior to buy irrigation water and to repay the costs of constructing and of operating and maintaining such works. The taxpayers bear the interest costs.[2]

This case arises out of the Central Valley Project in California.[3] The water works involved comprise the San Luis Unit.[4] One of three districts served by the Unit was the original Westlands Water District.[5]

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[1] *See Nevada v. United States*, 463 U.S. 110, 115, 128 (1983); *California v. United States*, 438 U.S. 645, 649, 650, 663 (1978).

[2] *See* U.S. Dep't of Interior, Bur. Reclamation, 1987 Summary Statistics, Vol. I at 1-8; General Accounting Off., Water Subsidies: Basic Changes Needed To Avoid Abuse Of The 960-Acre Limit (October 1989) at 8.

[3] *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-30 (1950).

[4] *See* 43 U.S.C. § 485h(a); U.S. Dep't .of Interior, San Luis Unit: A Report On The Feasibility Of Water Supply Development (1955); Pub. L. No. 86-488, 74 Stat. 156 (1960). Interior operates 238 such units. 1987 Summary Statistics, at 2.

[5] The original Westlands district, comprising about 400,000 acres, was founded in 1952. Cal. Water Code §§ 34000-38501. It was authorized to make contracts with Interior. *Id.* at §§ 35403, 35852, 35875, 35876. It was also authorized to impose charges on irrigators in order to make the payments required under such contracts. *Id.* at §§ 35423, 35470. Interior currently contracts with 611 such water districts. Water Subsidies, at 8.

Interior entered a "service" contract[6] with the Westlands district in 1963 and various "recordable" contracts[7] with landowners, including petitioners, thereafter. The majority Opinion (A19) noted that Interior contracted in "its capacity as a commercial contractor."

The 1963 contract obligates Interior to furnish each year at least 900,000 acre feet of water for use on "eligible" farm lands, including "excess" lands. It also provides that Interior will furnish drainage service to meet the drainage requirements of such lands. The 1963 contract has a 40-year term, which commenced in 1968 and runs through 2007. The Opinion (A4) acknowledges that petitioners are "beneficiaries" of the 1963 contract.

The contract contains only one price term. Article 6(a) sets out "the rate of payment" for service:

> "The rate . . . may not be in excess of Eight Dollars ($8) per acre foot and shall include a drainage service component of not to exceed Fifty Cents ($0.50) for the interceptor drain and a water service component of not to exceed Seven Dollars and Fifty Cents ($7.50)."

Article 6(a) also provides that the drainage service component shall be included in "the rate of payment" when drainage service first becomes available. Article 6(b) provides that all payments shall be made at "the rate" provided in Article 6(a). Article 3(d) of the contract requires that Interior shall furnish and the district shall pay for the water, "as provided in Article 6."

Each of Boston Ranch and West Haven filed a declaration under oath below that it "supported . . . the entry into the 1963 water service contract . . . based on the assumption that it would pay no more than $8.00 per acre foot for water and drainage service through the date of the sale of its excess lands." Interior did not dispute

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[6] *See* 43 U.S.C. § 485h(e).

[7] *See* 43 U.S.C. § 423e.

these declarations. The primary drafter of the 1963 water service contract was Interior.[8]

A second purpose of reclamation law is to spread the benefits of the program to as many farmers as practicable. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 297 (1958); H.R. Rep. No. 458, 97th Cong. 2d Sess. (1982) at 8; 43 CFR § 426.1(b). This goal is achieved by the excess land laws and, in particular, by recordable contracts between Interior and landowners providing for the sale of lands in excess of 160 acres.

Articles 23(a) and 25(b)(i) of the 1963 contract provide that each excess landowner, as a condition precedent to the right to receive water for his excess land, shall execute a recordable contract agreeing to dispose of his excess lands within ten years at a discounted price and agreeing further that if the land is not so disposed of, Interior shall have the power to dispose of it. Article 23(a) further provides that no such sale shall carry the right to receive water unless and until the terms are "approved" by Interior. As service became available, the petitioners entered into ten such recordable contracts with Interior. Each is in a form provided by Interior and is identical in language.[9]

Each recordable contract recites that it was made in "consideration" of the "benefits" to be derived under the 1963 service contract, that the service contract was "implemented" by it, and that it was made as an "inducement" to make water available for excess lands.

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[8] As noted in the Dissent (A30 n.4), the drafter "was almost certainly the government." This is confirmed by the fact that its provisions are substantially identical to exemplary provisions in other contracts. *See, e.g., Peterson v. United States Department of the Interior*, 899 F.2d 799, 809 (9th Cir. 1990).

[9] O'Neill executed recordable contracts on June 12, 1969, January 4, 1970, and January 13, 1970 covering a total of 974 excess acres. Boston Ranch executed two such contracts on January 21, 1972 covering 23,711 acres. West Haven Farming Co. executed recordable contracts on July 7, 1973, July 20, 1973, July 28, 1973, January 25, 1974, and April 2, 1974 covering 5,566 acres.

Article 5 of each recordable contract provides that all rights of the landowner to receive water for his excess land shall be "subject to" the provisions of the 1963 contract. Article 8 of each contract provides that no excess land shall be entitled to receive water except "while owned" by the landowner. Article 9 provides that when any excess land shall have been sold to an eligible nonexcess landowner, the land shall also be "subject to and governed by" the 1963 contract.

Article 11 of each recordable contract, as originally executed, provided that the landowner appointed Interior his attorney-in-fact to sell his excess land at any time after a period of ten years. However, that period of time is expressly subject to extension under Article 13, which provides that the computation of the period "shall not include any year or years in which water or service from the Project may not be available to the land involved through no fault of the District or the Landowner."

In the late 1970's petitioners' rights under the service contract and their recordable contracts were adversely affected by two unrelated events. The first occurred in 1976 when Interior stopped approving excess land sales. This "moratorium" resulted from two court decisions against Interior unrelated to this litigation.[10] Landowners desiring to sell their excess lands were, in the words of the majority Opinion (A19), "legally precluded" from selling during the moratorium.[11] The moratorium would last until 1984.

The second event occurred in 1978 when Interior's Solicitor issued a legal opinion which created substantial doubts about certain of the water rights established by

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[10] *National Land For People v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976); *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980).

[11] O'Neill, for instance, vigorously but unsuccessfully attempted to exercise his right to sell his excess lands after 1976.

the contracts.[12] Armed with the new opinion, Interior thereafter forced the district, by means of threats to cut off its water, to enter into new interim contracts covering the water subject to the 1963 contract. These contracts doubled the price of water. But they made no distinction between excess lands under extended contracts and other lands. One of the two underlying actions [13] was instituted in April 1979 by a group of landowners, including Boston Ranch and O'Neill. West Haven, Interior, the district, and four classes of landowners were also parties. Dismissal was denied by the court below. *Barcellos and Wolfsen, Inc. v. Westlands Water District*, 491 F. Supp. 263 (E.D. Cal. 1980).[14] The court broadly characterized the pleadings as "seeking a determination of the respective rights and duties of the parties under the . . . contract and Federal Reclamation Law" and as "requesting the Court to adjudicate the rights of all the parties and the United States government as they relate to water." 491 F. Supp. at 265, 267. Thereafter, the second underlying action [15] was filed, which was later consolidated with the first. The underlying actions were to remain unresolved until 1986.

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[12] Op. Solic. 85 Interior Dec. 297 (1978). Solicitor Krulitz admitted that the 1963 contract was in effect and authorized delivery of the amount of water, "at the price" stated therein to the area authorized to receive service. *Id.* at 299, 301. However, Solicitor Krulitz opined that the eastern edge of the original Westlands area was not authorized to receive water service. The opinion further provided that the amount the district had bound itself to pay for drainage facilities was not sufficient to repay the escalated costs thereof.

[13] *Barcellos & Wolfsen, Inc., et al. v. Westlands Water District, et al.*, E.D. Cal. No. CV 79-106-EDP.

[14] In support of its motions to dismiss, the government made its position about the contract price explicit in oral argument: "Sometimes the Government makes improvident bargains, and it has to change those improvident bargains . . . ."

[15] *Westlands Water District v. United States*, E.D. Cal. No. CV F-81-245-EDP.

The ten-year anniversary dates of O'Neill's recordable contracts occurred between June 12, 1979 and January 13, 1980. The tenth anniversary date of Boston Ranch's contracts occurred on January 21, 1982. Nonetheless, the majority Opinion (A6) acknowledged: ". . . [D]uring this period, Interior provided Project water at the same rate for lands whose ten years had run as for those whose time had not run."

B. 1982 Act And Rule 11(i)(4)

Before either of the above controversies had been resolved, Congress enacted major reclamation reform legislation. The Reclamation Reform Act of 1982 became law on October 12, 1982. Pub. L. No. 97-293; 96 Stat. 1263; 43 U.S.C. §§ 390aa-390zz-1.

Sections 203(a) and 203(c) of the 1982 Act describe the circumstances under which the Act's "discretionary" provisions, and their higher acreage limits and higher water rates, are triggered. 43 U.S.C. §§ 390cc(a), (c). The discretionary provisions (Sections 204-208) do not apply to petitioners and other "prior law recipients," because the first sentence of Section 203(b) provides that non-electing landowners in non-amending districts "shall be subject to Federal reclamation law in effect immediately prior to the date of enactment of this Act, as that law is amended or supplemented by sections 209 through 230 of this title." 43 U.S.C. § 390cc(b).[16]

Section 209(e), which is applicable to petitioners, provides that if any owner of excess lands was prevented from disposing of them because interior had withheld approval, the period of time for the disposal of such lands "shall be extended." 43 U.S.C. § 390ii(e).

Had the discretionary provisions applied, petitioners would have been required under Section 205(c) of the Act to pay, with respect to their excess lands operated

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[16] *See* H.R. Rep. No. 458, 97th Cong. 12-15 (1982); 128 Cong. Rec. 16,298, 16,426-27 (1982).

under extended recordable contracts, the "full cost" rate, or approximately $42.00 per acre foot, rather than the contract rate, starting 18 months after the resumption of excess land sale approvals. 43 U.S.C. § 390ee(c).

On December 6, 1983 Interior published its Rule 11(i)(4) implementing the above provisions of the 1982 Act. It read, in relevant part, as follows:

> "Land under recordable contract which is held by a water user not subject to the discretionary provisions . . . may continue to receive irrigation water at the contract water rate for the extended term of the contract . . . ." 48 Fed. Reg. 54,781 (1983) (former 43 CFR § 426.11(i)(4)).

The majority Opinion (A24) acknowledges that Rule 11(i)(4) created "reasonable expectations" on the part of petitioners that they would be able to continue purchasing water during the extended periods of their recordable contracts at the same price paid by others.

C. Amendatory Recordable Contracts

After Rule 11(i)(4) was adopted, Interior and various landowners executed amendatory recordable contracts.[17] In August 1984 Boston Ranch and West Haven executed seven such contracts extending their holding periods to various specific dates between 1990 and 1992.[18]

The amendatory contracts executed by Boston Ranch and West Haven were expressly "made . . . under the provisions of the Reclamation Reform Act of 1982." Each provided that in all respects, other than amending the maturity date, the original recordable contract "shall remain in full force and effect." The amendatory contracts, which are identical, were drafted by Interior.

Thereafter, as the majority Opinion acknowledges (A6), Interior continued to provide water at the same

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[17] *See* 43 CFR § 426.11(i)(3).

[18] Because O'Neill had been attempting to sell his lands since 1976, no amendatory recordable contracts were made with respect to his excess lands.

rate for excess lands operated under extended recordable contracts as for other lands. Interior again commenced approving excess land sales on July 10, 1984.[19] Accordingly, the 18-month period of Section 205(c), had it applied to petitioners, would have expired on January 10, 1986. Even after that date, Interior continued to sell water for Boston Ranch's and West Haven's excess lands without regard to the extension of their holding periods.

D. Stipulated Judgment

Between mid-1984 and mid-1986 the Westlands parties and the federal parties attempted to reach a settlement of the two underlying actions. Throughout this period of negotiations Rule 11(i)(4) was in effect.

While negotiations were proceeding before the judicial branch, several related events occurred in the legislative and executive branches. On December 19, 1985 Congress passed a law requiring legislative oversight of any proposed settlement.[20] On June 17, 1986, the 1978 Interior legal opinion which had precipitated the underlying actions was rescinded.[21] And on July 13, 1986 Congressional oversight of the settlement was initiated.[22]

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[19] 43 CFR § 426.11(i)(1).

[20] Pub. L. No. 99-190, 99 Stat. 1320.

[21] Op. Solic. M-36901 (Supp. I) (Jun. 17, 1986). The opinion of Solicitor Tarr stated: "We concur that the 1963 contract is a binding and enforceable obligation." On the service area and drainage payment issues, the Tarr opinion chose to "rescind" the Krulitz opinion.

[22] Interior submitted a proposed stipulated judgment to the Congress for formal 30-day oversight. On July 31, 1986, Congressman George Miller offered an amendment to a House appropriations bill which would have prohibited the settlement. This measure was approved by the House and sent to the Senate. 132 Cong. Rec. H5208-13 (daily ed. July 31, 1986). However, the appropriations bill passed by the Senate and enacted into law did not prohibit the settlement. Accordingly, the parties to the underlying actions were free to go forward with the judicial process. *See* 132 Cong. Rec. E2763 (daily ed. Aug. 6, 1986); *Id.* at S11767 (daily ed. Aug. 13, 1986).

On August 29, 1986 all parties to the underlying actions filed the proposed stipulated judgment. On December 30, 1986 the court, after a noticed public hearing on its fairness, adequacy and reasonableness, as required by applicable class action rules, signed and entered the judgment, which enforced the $8.00 per acre foot rate of payment in the 1963 contract.

Paragraphs 8 and 9 of the stipulated judgment provide that the United States shall reimburse water users for all water payments since 1978 in excess of the contract rate, plus interest. These refunds were to apply to all water, including water used on non-excess lands, water used on excess lands during the original ten-year term, and, as the Opinion (A11) acknowledged, "water used on excess lands . . . for the extended period."

The stipulated judgment also guarantees the 1963 contract service rate of $8.00 per acre foot in future years. Paragraph 4.1 of the stipulated judgment specifically provides, in relevant part, as follows:

> "Beginning the first day of the month after this Judgment is entered, the District and the United States shall perform the 1963 Contract; . . . . The 1963 Contract is a valid, enforceable and implementable contract entitling the District through the end of 2007 to water and other service by the United States as specified therein."

The judgment made no distinction between owners of excess lands operating under extended contracts and other landowners.

The stipulated judgment contains various other provisions confirming that petitioners shall be charged the contract price. For example, paragraph 17.6 provides that they shall bear no "water service charge . . . which is greater than the price of water which the District is obligated to pay under the 1963 Contract. . . ."

Attempting to secure their rights under their preexisting contracts was not cost-free to petitioners. By virtue of still other provisions, they released various val-

uable claims and assumed various new economic burdens. In paragraphs 7.5 and 20, even though the drainage service called for in the 1963 contract had never been provided by Interior, they agreed to drop their claims for reimbursement of past payments of the drainage service component of the contract price and to continue making such payments in the future. And under paragraph 7 they and their neighbors created and agreed to contribute $100 million to a trust fund to be used to finance construction of drainage service facilities.

Each of the petitioners filed declarations in the district court that the stipulations leading to the judgment were executed "in reliance upon the fact that [he or it] would be able to buy water at the 1963 contract rate until [his or its] excess lands were sold." Interior did not contradict this sworn testimony. Indeed, the district court transmitted a notice, which had been reviewed by the government, describing the proposed settlement to absent class members. Boston Ranch and O'Neill advised them that they "will receive the water service to which they are entitled under the 1963 Contract," unless they have "elected or elect" to become subject to the discretionary provisions of the 1982 Act.

During 1987 the 1963 contract was, in fact, performed, as directed by the judgment. Petitioners received the refunds required by the judgment. Furthermore, petitioners paid $8.00 per acre foot for water service at all times from December 30, 1986 to December 22, 1987. In exchange, they bore the new financial burdens they had undertaken in the stipulated judgment.

E. The Challenged Statute

The Omnibus Budget Reconciliation Act of 1987 was enacted on December 22, 1987. Pub. L. No. 100-203; 101 Stat. 1330. Section 5302(a) of that Act added new Section 224(h) to the Reclamation Reform Act. 43 U.S.C. § 390ww(h). This section reads, in relevant part, as follows:

> "The provisions of Section 205(c) are and have been applicable to all recordable contracts executed

> prior to October 12, 1982, and any decision, rule, or regulation promulgated by the Department of the Interior to the contrary is hereby revoked; *Provided*, That . . . the Secretary shall not seek reimbursement for any amounts due under this subsection or Section 205(c) which was due prior to the date of enactment of this subsection."

Neither the House nor the Senate reconciliation bill had said anything about charging full-cost rates to prior law recipients operating under extended contracts.[23] The differences between the two versions were referred to a conference committee on December 14, 1987. 45 Cong. Q. Wkly. Rep. 3183-92 (Dec. 26, 1987). The conference report was issued on December 21, 1987. H.R. Rep. No. 495, 100th Cong. 2d Sess. (1987). This was the first time new Section 224(h) appeared. The conference report explained that excess lands under extended contracts "have already received irrigation water at less than full cost for a period of ten years." *Id.* at 786. On December 22, 1987 Congressman Miller inserted remarks in the record purporting to justify his measure as "saving taxpayers tens of millions of dollars." 133 Cong. Rec. E4995 (daily ed. Dec. 22, 1987).[24]

Pursuant to the 1987 legislation Interior adopted new Rule 11(i)(4)(ii), effective as of January 17, 1989, which reads, in relevant part, as follows:

> "For land under extended recordable contract owned by prior law recipients, water deliveries shall be made at the full-cost rate . . . commencing De-

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[23] The Congressional Budget Act of 1974 establishes the procedure Congress is to follow as to budget reconciliation measures including, among other things, "revenue increases." 2 U.S.C. §§ 632(a)(2), 634(a)(2), 639, 641(a)(2), (d)(2).

[24] The Omnibus Budget Reconcilation Act of 1987 included hundreds of revenue-raising measures. It was designed to produce $9.1 billion in new revenues during the fiscal year. 45 Cong. Q. Wkly. Rep. 3190 (Dec. 26, 1987). President Reagan commented extensively on the 3,296-page package of taxing and related spending legislation during his January 25, 1988 State of the Union Address. 1 Pub. Papers 86 (1988).

cember 23, 1987, through the effective termination date of the extended recordable contract." 43 CFR § 426.11(i)(4)(ii).

F. Motion To Enforce Judgment

Petitioners have been forced to pay more than $42.00 per acre foot for water service since December 23, 1987, the day after the challenged statute was enacted.[25]

On March 29, 1988 petitioners moved to enforce the judgment, as provided therein. The district court denied the motion in rulings on August 10, 1988 and December 8, 1988. On January 6, 1989 petitioners appealed. The Court of Appeals for the Ninth Circuit affirmed.

The majority Opinion found (A23-24): "When the ten-year periods expired, the parties had to deal with the situation without explicit guidance from the contract. . . . [T]he contracts contained no explicit provisions governing the situation in which the parties found themselves." The majority Opinion (A25-26) further found: "Nowhere does the judgment discuss the issue of the price of water for excess lands under extended term contracts. . . . [T]he judgment does not provide for terms such as those spelled out in Interior's former rule."

The majority Opinion held (A23) that "[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public" and that inexplicit government contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority." The Opinion appeared to conclude (A25-26) that a consent judgment against the government, if inexplicit, must also be construed in favor of the government.

As an alternative ground of decision, the majority Opinion ruled (A16, A24) that a statute abrogating

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[25] West Haven still owns its excess lands. Between December 23, 1987 and July 31, 1990 it paid Section 224(h) surcharges aggregating $616,530. Boston Ranch sold its excess lands on May 31, 1989. Between December 23, 1987 and May 31, 1989 Boston Ranch paid surcharges aggregating $3,284,269.

government obligations is subject to "rational basis" review. The Opinion also expressed doubt (A25) that judgment rights against the government are constitutionally guaranteed to be "continuing" and "permanently" immune to legislative impairment.[26]

REASONS FOR GRANTING THE WRIT

I. THE MAJORITY OPINION CONFLICTS WITH DECISIONS OF THIS COURT

A. The Holding That Inexplicit Terms In Commercial Contracts Or Consent Judgments Against The Government Are Automatically Construed In Favor Of The Government Conflicts With Holdings Of This Court That Such Contracts And Judgments Are Interpreted In Accordance With Ordinary Canons Designed To Effectuate The Intent Of The Parties

1. *The Contracts*

Having found that petitioners' contracts were insufficiently "explicit," the majority Opinion (A23) initially resolved this perceived lack of explicitness by applying the following canon of construction:

> "In a case where the government is charged by private individuals with breaching its own obligations in violation of the Constitution, '[a]ny ambiguity in the contract must operate against the adventurer and in favor of the public.' *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 544 (1837)."

The amendment to the majority Opinion (A23 n.18) added the following footnote:

> "The *Charles River Bridge* rule is simply another way of stating that 'governmental contracts "should

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[26] On or about March 1, 1989 Interior instituted a new suit against the district to collect the disputed surcharges. *United States v. Westlands Water District*, E.D. Cal. No. CV-F-89-172 EDP. The district counterclaimed against the government, asserted third party claims against approximately 70 affected water users, including petitioners, and interpled the disputed funds with the court. The action was stayed on May 10, 1990 pending a final outcome in the instant case. As of July 31, 1990 the total amount of surcharges, plus interest, on deposit with the court was $6,621,778.

> be construed, if possible, to avoid foreclosing exercise of sovereign authority." ' [*Peterson*, 899 F.2d at 807] (quoting *Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986))."

The majority's exclusive application of this canon of construction conflicts squarely with decisions of this Court which hold that commercial contracts of the federal government are interpreted, instead, under the normal canons of contract interpretation, which look to the intention of the parties, as reflected in their course of performance, to ascertain their meaning.

The *Charles River Bridge* case involved a challenge under the contracts clause of an impairment to a statutory grant of a charter. The canon it announced has been applied by this Court in situations where the contract impaired was a statutory grant of a charter or franchise. *E.g.*, *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 666 (1878); *Larson v. South Dakota*, 278 U.S. 429, 435 (1929). *Bowen* was a takings clause case involving contracts with state agencies used to implement public employee participation in the Social Security program. The challenged statute impaired a termination provision in contracts which "exactly tracked the language" of the statute. 477 U.S. at 55. The Court found that the termination privilege in the contracts "bears little, if any, resemblance" to constitutionally protected rights in commercial contracts. *Id.* at 55. Such privilege was not a property right such as that created by "an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium." *Id.*

The canon of construction applied in *Charles River Bridge* and *Bowen* applies to a narrow class of contracts of which the contracts in those two cases are illustrative. "In general, it does not prefer the interest of a governmental agency as a party to a contract; . . . ." Restatement (Second) of Contracts § 207, comment a. Furthermore, even with respect to a statutory grant or a noncommercial contract, the canon comes into play only when the effort to ascertain the intent of the parties leaves the

contract's meaning uncertain. Williston on Contracts, 3d ed. § 602 at 324; *cf., Board of Trade of San Francisco v. Swiss Credit Bank*, 597 F.2d 146, 149 (9th Cir. 1979). The canon rests on public policy, rather than the intent of the parties. Restatement, § 207, comment a; Williston § 602 at 324, § 626 at 851. Indeed, the *Bowen* version of the canon, by its own terms, construes an inexplicit contract in favor of the government only "if possible."

The rule of construction applied in *Charles River Bridge* and *Bowen* is inapplicable here for both such reasons. The contracts in the case at bar were not statutory grants of a charter or a franchise, as in *Charles River Bridge*. Nor were they non-commercial contracts creating no property rights of the type involved in *Bowen*. These were contracts for the purchase and the sale of a valuable commodity, water, made by Interior in its capacity as a commercial contractor. Second, the *Charles River Bridge-Bowen* canon of construction is not applicable here, because application of the usual principles of contract interpretation establishes without doubt what the parties' contracts were.

This Court holds that the usual canons of contract interpretation will be applied to interpret an ambiguous or inexplicit government commercial contract. The Court said in *Hollerbach v. United States*, 233 U.S. 165, 171 (1914): "A government contract should be interpreted as are contracts between individuals. . . ." To the same effect are *Reading Steel Casting Co. v. United States*, 268 U.S. 186, 188 (1925), *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944), *Priebe & Sons v. United States*, 332 U.S. 407, 411 (1947), and *United States v. Seckinger*, 397 U.S. 203, 210 (1970).

Where the words of a federal contract are unclear the Court looks first to the intent of the parties. The federal courts seek to carry into effect the "real intention" of the contractors. *Garrison v. United States*, 74 U.S. 688, 691 (1869). The interpretation of an ambiguous federal contract will depend upon the "intention of the parties".

American Stevedores, Inc., v. Porello, 330 U.S. 446, 456, 458 (1947); *Seckinger*, 397 U.S. at 208, 209, 211-13. Determining intention is the "primary object" of interpretation. Williston, § 601.

This Court applies the canon that what the parties intended by the language of the contract is best revealed by how they actually performed the contract. It has construed an ambiguous District of Columbia construction contract against the government in accordance with the "work as actually done" which revealed "the practical construction which the parties put upon the terms of their own contract." *District of Columbia v. Gallaher*, 124 U.S. 505, 509-10 (1888). In *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913), a case construing a municipal grant of a utility franchise, the Court said: "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." In *Atwater v. United States*, 262 U.S. 495, 498 (1923) the Court enforced an initially unenforceable federal commercial contract because "it became valid and binding to the extent that it was performed." *See also* Uniform Commercial Code § 2-208; Restatement, § 202; Williston, § 623.

The course of performance maxim is applied with particular cogency in the context of contract extensions. Where a commercial arrangement between the United States and a private party is extended beyond its original term and both parties perform thereafter in a certain way, the rights and duties during that period will be implied in accord with such performance. *United States v. Bostwick*, 94 U.S. 53, 67 (1877).

Another of the standard canons of contract interpretation is that an ambiguous or inexplicit contract is to be construed against the drafter. The canon operates even if the drafter is the government. In *Garrison*, which involved an ambiguous price term in a sales con-

tract drafted by the government, this Court held that "doubtful expressions should . . ., according to a well known rule, be construed most strongly against the party who uses the language." 74 U.S. at 690. In *Seckinger*, which involved an ambiguous government construction contract, this Court noted "the general maxim that a contract should be construed most strongly against the drafter, which in this case is the U.S." 397 U.S. at 210. *See Restatement*, §§ 206, 207, comment a; Williston, § 602 at 327, § 621.[27]

The same canons of contract interpretation apply in a constitutional case where the government seeks to legislate on subject matter covered by a pre-existing contract. In *Lynch v. United States*, 292 U.S. 571 (1934) a beneficiary of a government insurance policy issued pursuant to statute sought to recover amounts alleged to be due when the government repealed the enabling law as part of the Economy Act of 1933. The Court held that the repealing statute violated the Fifth Amendment. In reaching this conclusion, it cited several of the above contract interpretation cases for this proposition: "When the United States enters into contract relations, its rights and duties are governed generally by the law applicable to contracts between private parties." 292 U.S. at 579 n.6.[28] The *Lynch* Court also held that the terms of the policies were to be found in part in the policies, themselves, and ". . . in part in the statutes under which they are issued and the regulations promulgated thereunder." 292 U.S. at 577.

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[27] Lower courts generally interpret reclamation contracts in accord with the usual canons. *E.g., United States v. Coachella Valley County Water District*, 111 F. Supp. 172 (S.D. Cal. 1953); *Tulelake Irrigation District v. United States*, 342 F.2d 447, 453 (Ct. Cl. 1965). Even the Ninth Circuit will apply such canons. *E.g., Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1032-33 (9th Cir. 1989); *but see Peterson*, 899 F.2d at 807.

[28] *Lynch* was later cited by the Court as authority for the following: "Normally, contracts between the United States and others are construed as contracts between private parties." *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 564-65 (1946).

In *Perry v. United States*, 294 U.S. 330 (1935) the Court ruled that federal legislation invalidating gold clauses in government-issued bonds was beyond the power of Congress. The Court stated that language incorporated into the bonds had to be fairly and reasonably "construed" in order to determine whether the bondholder held the rights he claimed. The Court found that such language was, indeed, "intended" to give him such rights. 294 U.S. at 348-49.

In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) the Court struck down a state statute impairing state bond obligations under the contracts clause. It stated as follows: "The obligations of a contract long have been regarded as including . . . the contemporaneous state law pertaining to interpretation and enforcement. . . . This principle presumes that contracting parties adopt the terms of their bargain in reliance on the law in effect at the time the agreement is reached." 431 U.S. at 19 n.17. *See also United States v. Larionoff*, 431 U.S. 863, 869 (1977).

The contracts in the case at bar contained one, and only one, price term, $8.00 per acre foot. That was what the 1963 contract called "the rate of payment."

Boston Ranch and West Haven testified below—and their testimony was not disputed—that they supported the 1963 contract on the assumption they would "pay no more than $8.00 per acre foot . . . through the date of sale" of their excess lands.[29] When Boston Ranch and West Haven executed their amendatory recordable contracts in 1984, Rule 11(i)(4) was deemed to be a part of those contracts. The majority Opinion (A24) ac-

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[29] The Dissent (A30 n.4) said: "If there were truly an ambiguity, I would be dubious about resolving that at our level without the development of evidence in trial court proceedings." The majority Opinion (A24 n.19) answered: "We would not ordinarily quarrel with such a suggestion, but neither party offers any parol evidence to help us interpret the documents at issue." In light of the evidence in the record, this statement is not correct.

knowledges that petitioners had "reasonable expectations" of paying the contract rate thereunder.

If there was any doubt about the intent of the parties, it was resolved by the way in which they jointly performed the contracts during the extension periods. Upon the tenth anniversary dates of the contracts, neither side altered its method of performance. Their consistent course of performance continued from June 12, 1979, when the first recordable contract entered its extended period, beyond January 10, 1986, when the 18-month grace period of Section 205(c) expired. At all times petitioners paid the same price paid by all others.

Finally, any remaining doubt would have been resolved in petitioners' favor under the principle that ambiguous or inexplicit government contracts are construed against the drafter. Here, Interior was the principal drafter of the contracts.

In summary, the majority Opinion's holding that inexplicit federal commercial contracts will be construed in a constitutional case solely in accord with a canon that the government wins simply because it is the government directly conflicts with the above decisions.

2. *The Judgment*

The decision below raises a similar issue with respect to the proper interpretation of the stipulated judgment. The majority Opinion appears (A25-26) *sub silentio* to have eschewed application of the canons of interpretation normally used to interpret a consent judgment in favor of a special canon of construction under which the government automatically wins. The application of such canon conflicts with prior decisions of this Court.

An ambiguous or inexplicit consent judgment against the federal government "is to be construed for enforcement purposes basically as a contract." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975). To similar effect are *Hughes v. United States*, 342 U.S. 353, 356 (1952), *United States v. Atlantic Refining Co.*,

360 U.S. 19, 23 (1959), and *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). In each of these cases an ambiguous provision of a consent judgment was construed against the federal government.

Where the language of a consent judgment is unclear, the Court will seek to find the interpretation which "the parties intended." *Atlantic Refining*, 360 U.S. at 24. The Court will look especially to the manner in which the parties have carried out the consent judgment. In *Atlantic Refining*, for example, the government had accepted the private party's interpretation without challenge for years. The Court, in construing the consent judgment against the government, emphasized that the interpretation advanced by the private party had been "adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start." 360 U.S. at 23-24.[30]

In the instant case, the underlying actions had been brought with a view to adjudicate the rights and duties of the parties as they relate to water under the contract and reclamation law. Throughout the negotiations leading to the judgment and at the time judgment was entered, Rule 11(i)(4) was in effect. The class notice, reviewed by the government, stated that non-electing landowners would pay the contract price. And petitioners testified below, without any contradiction, that they signed the stipulations in reliance upon the fact that they would

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[30] The result is no different in a constitutional case where a judgment against the government is impaired by subsequent legislative action. In *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811 (D.C. Cir. 1974) a statute allegedly impairing a judgment was successfully challenged on due process and separation of powers grounds. The District of Columbia Circuit rejected an argument of the government that the judgment should be construed to deny the challenger the rights she claimed. The court made its finding about what the judgment was "intended . . . to mean" without use of any special canon favoring the government. 501 F.2d at 815 n.21.

be entitled to "buy water at the 1963 contract rate until [their] lands were sold." [31]

If there was any doubt about what the parties mutually intended by their words, it was resolved by their subsequent deeds during the year after the judgment was entered. Immediately after entry, all prior payments in excess of the contract rate were refunded, with interest. From December 30, 1986 to December 22, 1987 petitioners paid, and Interior accepted, $8.00 per acre foot for thousands of acre feet of water which were delivered to their excess lands througout that period.

In short, the majority Opinion apparently construed the allegedly inexplicit stipulated judgment in accordance with a special maxim of construction under which the government prevails simply because it is the government. Decisions of this Court, on the other hand, require that any lack of explicitness in a consent decree must be interpreted in accordance with the standard canons of contract interpretation in order to establish what the parties meant.

B. The Holding That A Revenue-Raising Statute May Abrogate A Federal Commercial Contract Or Consent Judgment Conflicts With Holdings Of This Court That Congress May Not Abrogate Such A Contract Or Judgment Under The Fifth Amendment And The Separation Of Powers Provisions Of The United States Constitution

1. *The Contracts*

The majority Opinion appears to rest on the alternative ground of decision that Section 224(h) is valid under the due process and takings clauses of the Fifth Amendment [32] so long as Congress had any rational basis for adopting it. The Opinion (A16) relies upon *National*

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[31] Again, the majority's statement (A24 n.19) that "neither party offers any parol evidence" is incorrect.

[32] "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., Amend. V.

Railroad Passenger Corp. v. Atchison, T. & S.F. Ry. Co., 470 U.S. 451 (1985), which held that, where a federal statute substantially impairs a contract obligation, the "inquiry is especially limited, and the judicial scrutiny quite minimal" and the claimant must establish that Congress acted in an "irrational" way. 470 U.S. at 472.[33] The majority Opinion (A24) further ruled:

> "A legislature may repeal a statute that created non-contractual expectations as long as there is a rational basis for repeal. *See U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174 (1980). *See also United States v. Sperry Corp.*, [110 S.Ct. 387 (1989)]. It follows a *fortiori* that a repeal of regulations under that statute is subject to no greater judicial scrutiny."[34]

The decision that a revenue-raising statute impairing a commercial contract obligation owed by the United States to a citizen is subject to rational basis review conflicts with decisions of this Court holding that such impairments are subject to heightened scrutiny.

The application of a higher standard of due process scrutiny in the context of federal obligations (as contrasted with private obligations) was first announced by this Court in *Perry*, 294 U.S. at 350-51, as follows:

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . ."

On the same day, the Court decided that the same law, as applied to a private obligation, was constitutional.

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[33] *National Railroad Passenger* involved an alleged legislative impairment of a "private" contractual right. 470 U.S. at 471.

[34] In *Fritz* this Court applied the rational basis test where social and economic legislation impaired non-contractual benefits. 449 U.S. at 174-76. In *Sperry* the rational basis test was applied to a statute which imposed a federal charge upon money owed by one non-federal party to another. 110 S. Ct. 387, 396 (1989).

Norman v. Baltimore & O. R.R., 294 U.S. 240, 309-10 (1935).

The "dual standard" announced in *Perry* was noted in *United States Trust*, 431 U.S. at 26 n.25. The Court there held that a state's impairment of its own financial obligations is unconstitutional unless it is "necessary to serve an important public purpose." *Id.* at 25. Complete deference to the legislature, said the Court, is not appropriate "because the State's self-interest is at stake." *Id.* at 26. The Court labeled its approach in such a case as "careful scrutiny." *Id* at 29 n.27.

To similar effect are *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14 (1983) and *National Railroad Passenger*, 470 U.S. at 471, 472 n.24. *See also Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Such careful judicial review has produced a long line of decisions of this Court holding that revenue-raising statutes cannot deprive one of rights under government commercial contracts.[35]

In *The Sinking Fund Cases*, 99 U.S. 700, 718-19 (1879), the Court announced the following principle:

> "The United States . . . are prohibited from depriving persons or corporations of property without due process of law. . . . The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

In *Lynch*, the Court first established that the beneficiaries of the insurance policies abrogated by the statute had constitutionally protected legal rights:

> "War Risk Insurance policies are contracts of the United States. . . . [T]he policies . . . are legal ob-

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[35] Under reclamation law landowners own water rights, which are property rights appurtenant to their lands, to use the water beneficially. *Nevada v. United States*, 463 U.S. 110, 121-26 (1983); *Nebraska v. Wyoming*, 325 U.S. 589, 613-14 (1945); *Ickes v. Fox*, 300 U.S. 82, 84-96 (1937).

> ligations of the same dignity as other contracts of the United States and possess the same legal incidents. . . . War Risk policies, being contracts, are property and create vested rights." 292 U.S. at 576-77.

The Court then held that the repeal clause was unconstitutional, as follows:

> "The Fifth Amendment commands that property be not taken without making just compensation. . . . Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. [Citations.] . . . [T]he contracts of war risk insurance were valid when made . . . . [T]he due process clause prohibits the United States from annulling them. . . .
>
> ". . . Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation." *Id.* at 579-80.

In *Perry*, the Court rejected the notions that "the Congress can disregard the obligations of the Government at its discretion" and that a federal obligation is an "illusory pledge." 294 U.S. at 350. Citing *Lynch* with approval, the Court said: ". . . [T]he Congress has not been vested with the authority to alter or destroy those obligations. . . ." *Id.* at 353-54. Finally, it said that a government obligation is:

> ". . . the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplated a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgeor. This Court has given no sanction to such a conception of the obligations of our Government." *Id.* at 351.

In *United States Trust*, the Court said:

> ". . . [A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer

> to spend the money to promote the public good rather than the private welfare of its creditors . . . . [A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." 431 U.S. at 29-31.

The Court also noted: "Contract rights . . . may be taken for a public purpose provided that just consideration is paid." *Id.* at 19 n.16. It further noted: "The States remain free to exercise their power of eminent domain to abrogate such contractual rights, upon payment of just compensation." *Id.* at 29 n.27. *Accord*, *Energy Reserves Group*, 459 U.S. at 412 n.14.

Finally, in *Bowen*, the Court said the federal government has the power to enter contracts that confer vested rights, and the "concomitant duty to honor those rights." 477 U.S. at 52. The Court further stated: ". . . Congress does not have the power to repudiate its own debts . . . simply in order to save money." *Id.* at 55. For both these propositions the Court cited *Lynch* and *Perry*.[36]

In summary, the majority Opinion applied the rational basis test operative where a federal statute impairs a contract between two private parties. This conflicts with this Court's decisions holding that elevated scrutiny will be undertaken where, as here, the commercial contract is between a private party and the federal government.

2. *The Judgment*

The majority Opinion further states (A25-26) in what was also apparently an alternative ground of decision with respect to the judgment: "We doubt that even if the parties had *expressly* incorporated Interior's rule into the judgment, they would be entitled permanently to benefit from it were the law to change. 'The parties cannot,

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[36] The Court has recognized that the *Lynch-Perry* line of cases is subject to an exception where the statute expressly reserves the power of Congress to alter, amend, or repeal it. *The Sinking Fund Cases*, 99 U.S. at 730-31; *Bowen*, 477 U.S. at 52. No such statute exists in the reclamation laws. *See* 43 U.S.C. § 469; *Ickes*, 300 U.S. at 91; *see also* 43 U.S.C. §§ 423d, 485b, 485h-2.

by giving each other consideration, purchase from a court of equity a continuing injunction. . . .' *System Federation v. Wright*, 364 U.S. 642, 651-53 (1961)." [37] This alternative basis for the decision conflicts with this Court's prior decisions under the separation of powers provisions of the Constitution,[38] which hold that private rights against the United States vested in a federal court judgment are, indeed, continuing and permanent and may not be altered or destroyed by the subsequent action of Congress.

Where private rights are at stake, this Court's examination of a Congressional attempt to control the manner in which the rights are adjudicated has been "searching." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 854 (1986). A long line of cases decided by this Court involving legislative attempts to control the outcome of government disputes confirms this principle.

In *Hayburn's Case*, 2 U.S. 409 (1792) five Justices of this Court opined that a 1792 statute was unconstitutional because it subjected federal court decisions involving federal obligations to review of Congress.

This principle was applied in the leading case of *United States v. Klein*, 80 U.S. 128, 146 (1871). The government confiscated cotton of a participant in the Confederate cause. In 1863 Congress passed a statute authorizing persons who had not given aid or comfort to the Confederacy to recover their losses. The President issued a proclamation under which one who executed an oath to that effect would have his property restored. The

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[37] *System Federation* does not apply to the case at bar. It arose out of a dispute between two private parties. "[T]he court was not acting to enforce a promise but to enforce a statute." 364 U.S. at 653. The judgment had not been impaired by later legislation. And one party sought to modify, not enforce, it.

[38] "All legislative powers . . . shall be vested in . . . Congress. . . ." U.S. Const. Art. I, § 1. "The judicial power . . . shall be vested in [the federal courts]. . . ." *Id.* at Art. III, § 1. "The judicial power shall extend to all cases, in law and equity, arising under [federal law and] . . . to controversies to which the United States shall be a party." *Id.* at Art. III, § 2.

participant sued and won, and the government appealed. Congress thereafter inserted in an appropriations measure a provision which required dismissal of the claim. This Court invalidated the statute, saying:

> ". . . What is this but to prescribe a rule for the decision of a cause in a particular way? . . .
>
> "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.
>
> "It is of vital importance that those powers be kept distinct . . . ." [39]

The Court has announced the same principle in numerous other cases. *E.g.*, *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. 421, 431 (1856); *Gordon v. United States*, 117 U.S. 697, 701, 703 (1865); *United States v. O'Grady's Executors*, 89 U.S. 641, 647, 648 (1875); *McCullough v. Virginia*, 172 U.S. 102, 123, 124 (1898); *Hodges v. Snyder*, 261 U.S. 600, 603 (1923).[40]

Thus, the Opinion's alternative holding that petitioners are not entitled permanently to benefit from the enforcement of a federal contract by a court judgment conflicts with this Court's decisions in the above cases.[41]

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[39] This Court has observed that the statute in *Klein* was invalidated *inter alia* because ". . . it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404 (1980).

[40] As noted in the Dissent (A36-38), this case is not within the "exception" to the general rule applicable where the right adjudicated is "public." *Wheeling and Belmont Bridge*, 59 U.S. at 432; *Hodges*, 261 U.S. at 604, *System Federation*, 364 U.S. at 649-50.

[41] When a Congressional statute is challenged and "serious doubt" of its constitutionality exists, it is a "cardinal principle" to first determine whether an interpretation of the statute is "fairly possible" by which the issue may be avoided. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971). The majority Opinion (A13-15) declined to apply this principle. The holding that the word "all" requires application of the statute to beneficiaries of the stipulated judgment conflicts with *Daylo*, 501 F.2d at 816-19; *see also Pope v. United States*, 323 U.S. 1, 9 (1944). Furthermore, the

II. THE MAJORITY OPINION DECIDES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

Legislative breaches of obligation to enhance government revenues have reached this Court before. As the Court once observed: "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." *United States Trust*, 431 U.S. at 26; *see also Lynch*, 292 U.S. at 580.

Federal revenues raised by Section 224(h) will have been substantial. To date surcharges imposed in Westlands, alone, exceed six million dollars, and Westlands is only one of 611 districts performing reclamation contracts with Interior. Representative Miller assured his fellow members of Congress that his measure would add "tens of millions of dollars" to the federal coffers.[42]

Business-type operations of all types produced in fiscal year 1988 12% of federal revenues on an accrual basis, or $131 billion, of which $82 billion resulted from the sale by the government of goods and services. Financial Management Serv., U.S. Dep't of Treasury, Consolidated Financial Statements of the United States Government, Fiscal Year 1988, at 7, 12. The revenue-enhancing potential of statutes which increase the government's sale price in its commercial contracts is very significant. If the majority Opinion stands, it will send a signal to Congress that it may now utilize this potent technique in the battle to eliminate budget deficits and the national debt.

But short-term budget benefits are outweighed by long-term policy costs. The federal reclamation program is a significant on-going federal program. New contracts are being signed, existing contracts are being renewed, and non-excess landowners are buying formerly excess lands.

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holding that the phrase "executed prior to October 12, 1982" includes contracts amended thereafter conflicts with *Larionoff*, 431 U.S. at 879.

[42] Section 224(h) was not the first such measure. *See* 43 U.S.C. § 390cc(b) (second sentence); *Peterson*, 899 F.2d 799. And it may not be the last. *See* 136 Cong. Rec. H3603 (June 14, 1990).

If Congress may raise water prices at will, these districts and landowners can be expected to become much more reluctant to enter into such transactions, at least on customary terms.

The costs to the public of upholding federal power to alter federal obligations are also important in the judicial arena. The United States becomes a party to approximately 100,000 new federal court civil suits each year. *See* R. Posner, The Federal Courts: Crisis And Reform (1985) at 63-64. The government agrees to, and the federal courts approve, numerous consent judgments. If Congress can hereafter alter such consent judgments whenever and however it sees fit in order to meet its budgetary needs, private litigants may experience a significant disincentive to settle pending litigation with the government. This could significantly increase the caseload of the Justice Department and the federal courts.

Governments need to make mutually binding contracts in order to carry out public policy. If they do not honor their old contracts, they will not be able to make new ones. "Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public . . . debtors." *Lynch*, 292 U.S. at 580.

CONCLUSION

For these reasons, a writ of certiorari should issue.

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